



31 May 2024

Competition Task Force

The Treasury

Langton Crescent

Parkes ACT 2600

By email: CompetitionTaskforce@treasury.gov.au

Dear Treasury,

2024 Competition Task Force

1. Youth Law Australia kindly seeks to contribute this submission to the Competition Task Force

About Youth Law Australia

2. Youth Law Australia (YLA) (formerly the National Children's and Youth Law Centre) is an accredited, national, community legal centre dedicated to helping children and young people under the age of 25 years and their supporters to understand their legal rights and find solutions to their legal problems.
3. In January 2021, Youth Law Australia was granted four-year funding by the Fair Work Ombudsman's Community Engagement Grants Program to provide a specific employment law service for young people under 25. This project is called the Young Workers' Rights Service (YWRS).
4. We have significant experience and expertise in advising children and young people and their advocates on issues including their experiences in employment, education and training. We acknowledge the disproportionate, ongoing and intergenerational harm experienced by First Nations children and young people. We also acknowledge the many young people who have been courageous in sharing their experiences with us.



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Prevalence of non-compete and related clauses in employment contracts

5. A review of our data over the last two years shows that the YWRS provided 2,056 detailed advices. Even in cases not specifically involving questions about restraint of trade, it is worth noting that nearly every written employment contract we see contains some form of restraint of trade provisions.
6. We have seen restraints of trade clauses across all sectors of the skilled and unskilled workforce. For example, among disability care workers, childcare workers, property managers, retail workers, tutoring services, sports and recreational instructors, mechanical trades and even cleaning services.
7. We have seen restraints of trade being applied with the effect of limiting workers taking on concurrent employment, as well as future employment. For example, low-skilled casual workers in bakeries and shoe shops who are only offered limited casual shifts, yet who are contractually restrained from taking on concurrent casual work elsewhere, and have been dismissed when it is discovered that they have done so. This places young people in an impossible situation where they cannot make ends meet, yet risk being dismissed if they take on other work.
8. In the past two years, the YWRS has assisted with 17 matters specifically concerning questions about restraint of trade and non-compete clauses.
9. From an in-depth review of those matters, the following common themes emerge:
 - (a) Workers are extremely worried about the existence of restraint of trade clauses, even if our view is that they are unenforceable at law.
 - (b) Workers are very susceptible to pressure by their employers to stay in an unhappy and unproductive employment relationship because of the existence of post-employment restraints.
 - (c) Workers are not aware that restraint of trade clauses are unlikely to be enforceable until they receive legal advice. Even after we provide this information to them, they remain stressed about what an employer may do.
 - (d) Restraint of trade clauses are hugely de-stabilising, by effectively requiring young people to move their whole lives for work, away from their support networks and established communities, or to commute long distances. Most of our clients affected have been from rural or remote areas, or in the far outer suburbs of capital cities where work options in their chosen industry are scarce.
 - (e) Contractual provisions relating to concurrent or post-employment restraints, non-solicitation and confidentiality are used interchangeably.
 - (f) Clauses are inconsistently and ambiguously drafted, and employers will exploit this in asserting an interpretation favourable to them, claiming huge sums of alleged damages and threatening legal action. For example, a clause may prevent an employee from being “engaged with” or “interfering with any relationship between” their clients or contractors. While such terms would be too vague to be legally enforceable, young workers feel incendiary levels of fear and stress when they

receive formal letters of demand from lawyers claiming hundreds of thousands of dollars.

- (g) Workers often need intensive legal support to understand the legal position, and to assert their position in the face of heavy pressure and such threats from employer representatives.
- (h) Client service delivery is detrimentally affected by restraint of trade clauses – particularly in remote areas, as highlighted by our case studies especially in the health/care sector and in qualified trades.

Case studies

10. The following de-identified case studies highlight the issues of concern identified above. Please note that names, occupations and locations have been changed to maintain client confidentiality:

Iris – 19-year-old childcare worker

Iris lived in the far outskirts of a capital city. Iris was dismissed from her employment at a childcare centre. She was upset because her contract said she cannot work in childcare in the area for 12 months. Iris said she had just enrolled in a course to study in this field and was unsure what she was going to do.

Nancy – 24-year-old disability support worker

Nancy lived in a regional town. She had been employed 2 days/week as a disability carer working with the same client for 4 years (without pay increase). Her employment contract stated that during her employment and for a period of 12 months following the termination of her contract she could not “directly or indirectly induce, recruit or solicit” any of the company’s clients or customers.

Nancy was considering getting an ABN and working directly for her regular client as a disability carer. However, offering to provide direct services with an ABN to a current client of her employer could potentially breach the non-solicitation clause in her contract even if the client approached her first. It was unknown whether her company would seek to enforce the non-solicitation clause against her but the non-solicitation clause was likely to deter her from making the move to work as an independent contractor.

Alison – 23-year-old disability care worker

Alison lived in a capital city. She resigned from her job as a disability care worker due to burn-out and workplace dissatisfaction. She then started working for a different disability care provider doing similar work. Alison was concerned about the operation of the 'Non-solicitation of Clients/Patients' clause in her contract. Specifically, some of her former clients had told her former employer that they wanted to “follow her” to her new employer as they would otherwise only be able to access services via telehealth rather than in person.

Alison was concerned that her former employer may try to recover any losses from her pursuant to a clause in her contract stating "... you acknowledge and agree that you will be liable to the Employer for its estimated or actual loss and damage to the value of the Employer's annualised revenue generated".

Joshua – 24-year-old podiatrist

Joshua took up a job as a podiatrist in a suburban clinic. He signed a contract with a clause prohibiting him from any association with any competitor for up to 24 months within a 15km radius. This clause was connected to a contractual acknowledgement that employees would be able to obtain confidential information during their employment, including trade secrets and client lists.

However, Joshua did not have any access to such confidential information.

Joshua worked 5 shifts with the employer before he decided it wasn't the right fit for him and resigned.

Joshua soon started work with a new clinic, offering similar services, in a similar location. He received numerous letters from his former employer, threatening legal action.

Jessica - 20-year-old dance teacher

Jessica lived on the extreme outskirts of a capital city. She started working as a casual dance teacher at a local studio when she was 17 years old.

Her contract prohibited her from working or volunteering for a competitor in the same or similar role for 36 months post-employment, within 15km of each business site (noting the company had several sites).

After experiencing harassment at work, Jessica left, and took on some casual work outside of the 15km radius. This however became unsustainable due to the distance from her home and time/cost of the commute.

She then took up a job within the 15km exclusion area with another dance studio, believing it to be acceptable because it differed from her previous role.

Jessica received a letter from her former employer warning her of various perceived breaches of the restraint of trade clauses in her contract. They also told her they had contacted her new employer to inform them. Jessica was worried that she would have to quit her new job.

Jasper – 19-year-old sports coach

Jasper lived in a regional town. He was hired as a 16-year-old casual sports coach at a local business. His employment contract included a term that said that for six months after conclusion of his employment he would “not provide services, be engaged, associated with or otherwise involved in business activity that is competitive with the business”. He worked 3 days a week for nearly four years. He had no responsibility for enrolments, marketing, business turnover or other managerial decisions. He resigned when he was 19 to work at a different business. Upon resignation, his boss spoke to him sternly saying he was not allowed to work for another business because of his contract. Jasper maintained his move posed no commercial threat to the first business and had no plans to take any clients with him.

Patrick – 21-year-old boilermaker

Patrick worked in a town in a remote area of Australia as a qualified tradesperson. His contract included a prohibition on “interfering with” any relationships between the employer and their clients/suppliers, or on soliciting business from any of their clients within a 12 month restraint period.

Upon resigning, Patrick started working for another local company which was not a competitor of his former employer. He did not have any confidential information or involvement in business dealings about either company but by hiring Patrick, the new employer had less need to contract work out to Patrick's old employer. This was a company decision outside of Patrick's control.

Patrick was sent threatening letters from his first employer's lawyers, asserting that he had breached his post-employment contractual obligations, and that if he did not cease employment with the new employer, they may commence proceedings, seeking over \$400,000 + costs in loss of business.

Patrick was under considerable stress at the time and was weighing up whether to resign or possibly take on a different position with the new employer to appease the old employer. Patrick required intensive assistance from YLA to respond to his former employer's solicitors asserting his legal position on two occasions.

Justin – 23-year-old plumber

Justin lived on the far outskirts of a capital city. He was employed for 6 months with a company pursuant to a contract that contained post-employment restraints to “not solicit or attempt to solicit business from any client ... not to engage or prepare to engage in a business that competes with the Employee ... not to interfere or attempt to interfere with the relationship between the Employer and its Clients, employees or suppliers”. After his resignation, he got a job through a family friend working at a business that is a client of his old employer. Simply being employed by a client of the old employer did not breach any of the post-employment restraints. Yet two weeks later, he received a letter from the old employer's solicitors demanding his resignation within 7 days.

Othelia – 21-year-old property manager

Othelia lived in a regional town. She was having a hard time at work and wanted to resign. However, her boss told her that she could not be employed at another property management business unless she moved away from the area. Othelia was young and said she had no family support. She felt stuck between a job she was not happy with, or risking not having any means of income at all.

Our recommendations

11. Noting that our submission is primarily focussed on the experience of people under the age of 25 who have engaged with our service, we respectfully make the following recommendations -

Recommendation 1:

That contractual restraints on post-employment/post-contractor services, be banned and deemed to have no effect, with contraventions to be identified as civil remedy provisions in the *Fair Work Act 2009*.

Recommendation 2:

That contractual restraints on current employees and/or independent contractors taking on concurrent employment/contracts for services, be banned and deemed to have no effect, with contraventions to be identified as a civil remedy provision in the *Fair Work Act 2009*, where the concurrent work does not affect a worker's capacity to perform the inherent requirements of either role or ability to fulfil their contracted obligations, including to avoid conflicts of interest and maintain confidentiality.

Recommendation 3:

That any contractual provisions regarding confidentiality and non-solicitation be standardised and limited to ensure consistency of interpretation and to accord with public policy principles of freedom of movement, economic participation, flexible work opportunities and access to services.

If you would like to discuss this submission, please contact Anastasia Coroneo on (02) 9067 6510 or via Anastasia.coroneo@yla.org.au.

Yours faithfully,



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